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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

In re Application for Subpoena under DMCA § 512 of Barkley & Associates, Inc.	Case No.: 25-mc-0010-WLH(Ex) Plaintiff Barkley’s Opposition to Defendant Quizlet Inc.’s Motion to Quash Plaintiff’s DMCA § 512(h) Subpoena Magistrate Judge Charles F. Eick No Hearing
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1 **A. INTRODUCTION**

2 Plaintiff Barkley provides practice exams and textbooks to nursing
3 students studying for their certification exams. Some nursing students
4 make unlicensed copies of these textbooks and exams and then post them
5 to the Quizlet.com website. Despite Barkley filing DMCA takedowns and
6 suing in federal court, Quizlet still encourages users to upload Barkley's
7 pirated textbooks and study materials and then promotes its site as a
8 source of Barkley's copyrighted materials. Worse yet, Quizlet uses these
9 pirated textbooks and study materials to train an AI chatbot Q-chat which
10 users use to distribute pirated study materials to each other and cheat on
11 exams.

12 Barkley requires the name and contact information of each user
13 identified in its 17 U.S.C. § 512 subpoena because the statute entitles
14 Barkley to determine whether to add these users to a lawsuit.

15 **B. ARGUMENT**

16 **1. The First Amendment only protects online political, re-**
17 **ligious, and similar speech but not the infringers' copy-**
18 **right infringement.**

19 Where online speech raises at least some constitutional protections,
20 courts in the Ninth Circuit apply a two-part test for determining whether
21 to allow discovery seeking the identity of an anonymous defendant:

22 (1) The plaintiff must produce competent evidence support-
23 ing a finding of each fact that is essential to a given cause of
24 action; and (2) if the plaintiff makes a sufficient evidentiary
25 showing, the court must compare the magnitude of the
26 harms that would be caused to the competing interests by a
27
28

1 ruling in favor of the plaintiff and by a ruling in favor of the
2 defendant.

3 *Art of Living Found. v. Does 1-10*, No. 10-CV-05022-LHK, 2011 WL
4 5444622, at *7 (N.D. Cal. Nov. 9, 2011). Political speech is afforded more
5 First Amendment protection than infringing speech. *In re Anonymous*
6 *Online Speakers*, 661 F.3d 1168 (9th Cir. 2011) (“We suggest that the na-
7 ture of the speech should be a driving force in choosing a standard by
8 which to balance the rights of anonymous speakers in discovery dis-
9 putes.”). “[A] more rigorous standard may be applicable where the defend-
10 ant’s speech is political, religious or literary, while commercial speech
11 should be subject to a lesser standard.” *Art of Living Found*, 2011 WL
12 544622, at *14.

13 Pointing to such non-political speech, the court in *Art of Living* con-
14 sidered *Sony Music Entertainment v. Doe*, where the court indicated
15 “[a]nonymous speech...does not have absolute protection. The First
16 Amendment...does not protect copyright infringement, and the Supreme
17 Court, accordingly, has rejected First Amendment challenges to copyright
18 infringement actions.” 326 F. Supp. 2d 556, 562-63 (S.D.N.Y. 2004) (citing
19 *Harper & Row. Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). In
20 *Sony*, the court ultimately ruled that the purported infringers whose iden-
21 tities Sony sought were entitled to First Amendment protection, but that
22 protection did not extend to unlawful copyright infringement. *Sony* 326 F.
23 Supp. 2d at 567 (“In sum, defendants’ First Amendment right to remain
24 anonymous must give way to plaintiffs’ right to use the judicial process to
25 pursue what appear to be meritorious copyright infringement claims.”).

26 In contrast, the speech in every case Quizlet cites is political, reli-
27 gious, or has other reasons for allowing the Internet posters’ anonymity.

1 These are all situations unlike the present case where ongoing and re-
2 peated copyright infringement is alleged.

3 For example, *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th
4 Cir. 2011), one company Quixtar tried to learn who at a second company,
5 TEAM, orchestrated an Internet “smear campaign via anonymous post-
6 ings and videos disparaging and [Quixtar’s] business practices.” *Id.* at
7 1171. The court held the speech to be protected because it was like any
8 other non-online speech. *Id.* at 1173.

9 Another case Quizlet cites, *In re DMCA § 512(h) Subp. to Twitter,*
10 *Inc.*, 608 F. Supp. 3d 868, 874 (N.D. Cal. 2022), involved a Twitter post
11 critical of a person the opinion calls “MoneyBags” tweeted about a private
12 equity billionaire’s wealth and alleged lifestyle. *Id.* at 874–75. The court
13 quashed the subpoena because the online posts were like non-online posts
14 subject to First Amendment protections. *Id.* at 876.

15 “Where the nature of the speech is public criticism, even if not
16 explicitly political or religious, and disclosure of an anonymous
17 speaker’s identity could have a chilling effect on such public
18 criticism, then at least some First Amendment concerns are at
19 stake. The degree of scrutiny varies depending on the circum-
20 stances and the type of speech at issue.”

21 *Signature Mgt. Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145, 1154
22 (N.D. Cal. 2013).

23 Here, the nature of the speech was neither political nor religious.
24 The people whose identities are sought are copyright infringers. Barkley
25 seeks their identities to sue them. *Sony* and *Art of Living Found* both indi-
26 cate that the information sought by Barkley here is precisely the type
27 when the First Amendment must give way to Barkley’s copyright rights.

1 Like in *Sony* where the court did not quash a subpoena filed under section
2 512 of the DMCA because users were distributing illegal copies of music
3 songs, here Quizlet's users are distributing illegal copies of Barkley study
4 materials.

5 **2. Quizlet's allegations of false statement are inappropriate**
6 **because they allege no specific facts.**

7 In over two pages, Quizlet alleges Barkley's declaration has false
8 statements. Though it explains why false statements violate FED. R. CIV.
9 P. 11, it mentions and quotes only one "Quizlet is assisting in the sale of
10 counterfeit goods." In response, Quizlet's only protest that its "products
11 are predominately free." So, Quizlet is effectively arguing that Barkley's
12 statement is "verifiably false" because its users offer infringing Barkley
13 products on its "predominately free" website. One, Quizlet apparently ad-
14 mits that it charges at least *some* customers for access to Barkley content.
15 So, the alleged "false statements" submitted in support of Barkley's sub-
16 poena are admitted by Quizlet to be at least partially true. Two, Quizlet's
17 self-selected business model – be it advertisements, self-promotion, or
18 subscription revenue – has very little bearing on the ultimate claim.
19 Quizlet offers Barkley's copyrighted content on its website and makes
20 money doing so. In the process, Quizlet either assists or turns a blind eye
21 to the ongoing infringement by its users. And, Barkley seeks to uncover
22 the identities of these infringers so that it may pursue valid, copyright
23 claims against them. Quizlet's perjury claim is incorrect and, largely irrel-
24 evant to the matter at hand – a subpoena seeking information about these
25 accused infringers. Notably, Quizlet does not deny that these users in-
26 fringe, attempt to defend their posting of copyrighted Barkley content, or
27 allege that Barkley's copyright is somehow invalid.

